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Filing date: **02/25/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050557
Party	Plaintiff TRP Entertainment, LLC
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Submission	Reply in Support of Motion
Filer's Name	Matthew D. Francis
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Signature	/Matthew D. Francis/
Date	02/25/2010
Attachments	REDACTED Reply 56(f) Motion.pdf (25 pages)(966899 bytes)

aid it in an “improvident or premature grant of summary judgment.” Rule 56(f) Mot., p. 17, citing 10B Charles A. Wright, Arthur R. Miller, Federal Practice and Procedure 3d, § 2740 (2009)(citations omitted). This contradicts the tenets of Rule 56(f), which “should be applied with a spirit of liberality,” and which should generally be granted as a matter of course. *Id.* While the materials and arguments submitted by DVP in support of its SJ Motions are nowhere near sufficient to meet the stringent requirements of Rule 56(c), TRP is nevertheless entitled to the discovery requested in its Rule 56(f) Motion and in this Reply before responding to them.

II. REPLY ARGUMENTS

A. DVP’s “Factual Background” Misrepresents the True Facts of this Dispute

In the “Factual Background” section of the DVP Opposition, DVP blames TRP for not conducting depositions before DVP filed its SJ Motions because TRP allegedly “procrastinated” in conducting discovery. DVP Opp., p. 2. As stated in TRP’s Rule 56(f) Motion, TRP did not procrastinate in conducting discovery, and was instead sandbagged by DVP in setting depositions, answering discovery, and producing documents. Rule 56(f) Mot., pp. 1-17. TRP served first sets of discovery on June 11, 2009, six (6) days after discovery opened, and sent meet and confer correspondence on July 24, 2009, when DVP failed to properly respond to these requests despite extensions of time to respond. Rule 56(f) Mot., pp. 2-3. On October 29, 2009, TRP served second sets of discovery on DVP, which DVP did not respond to until December 4, 2009, after receiving an extension of time to do so. Rule 56(f) Mot., pp. 3-5. DVP did not serve responsive documents to these requests and in furtherance of their Initial Disclosures until December 9, 2009, the same day they: (1) filed the DVP Genericness MSJ, which resulted in suspension of this proceeding; (2) served Registrant’s Second Amended Initial Disclosures, listing new Rule 26(a) witnesses and 1,282 pages of documents; and (3) served Second Amended Responses to First Sets of Interrogatories and Requests for Production, containing various new responses. Rule 56(f) Mot., pp. 6-7. Simply put, TRP was diligent in discovery.

It is TRP’s counsel’s practice to obtain written discovery before engaging in oral

depositions, and that is exactly what TRP attempted to do here. See supra. Furthermore, the parties discussed potential resolution of this dispute during the months of October and November of 2009. Rule 56(f) Mot., p. 3. When settlement efforts failed, TRP requested mutually-acceptable deposition dates on November 6, 2009. Id. When deposition dates were set, court reporters retained, and airplane tickets booked, DVP strategically filed its SJ Motions to prevent the depositions from going forward. Rule 56(f) Mot., pp. 6-7. For at least these reasons, the fact that TRP did not request deposition dates until November 6, 2009 should not be held against it.²

Next, DVP attempts to blame its failure to provide complete discovery responses, amended Initial Disclosures, and associated documents on the fact that a protective order was not entered in this case until November of 2009. DVP Opp., p. 3. This argument is specious, and the Board should reject it out of hand because TRP's counsel sent DVP's counsel a Stipulated Protective Order on May 4, 2009, but he refused to sign an almost identical version of it until November 2, 2009. See February 25, 2010 declaration of Matthew D. Francis ("Francis Reply Decl."), ¶ 2, Exhibit W; compare Exhibit W with Docket No. 9.

Also specious is DVP's claim that it timely provided information and documents pursuant to Rule 26(e) when it allegedly realized its discovery responses "were in some fashion incomplete." DVP Opp., p. 3. As stated above and in TRP's Rule 56(f) Motion, DVP did not fully respond to or supplement discovery responses and Initial Disclosures until it filed the DVP Genericness MSJ, which stayed this proceeding and prevented TRP from further discovery regarding new witnesses, new discovery responses, 1,282 pages of new documents, and new Initial Disclosures. See supra.; Rule 56(f) Mot., pp. 2-8. DVP's claimed innocence is not credible, and its discovery efforts were aimed at thwarting discovery as opposed to providing discovery.

Finally, with regard to Harmony, DVP claims to have amended its Initial Disclosures as

² Contrary to DVP's contentions and misunderstanding of the scheduling order in this proceeding, the controlling discovery cutoff date as of November 6, 2009 was December 2, 2009, as opposed to November 25, 2009. See Docket No. 7; see also DVP Opp., pp. 2-3, n. 1.

soon as it discovered the alleged “mistake” in listing Harmony’s address as “c/o Jacob L. Hafter.” DVP Opp., p. 3. However, DVP did not serve its amended Initial Disclosures until the same day it served the DVP Genericness MSJ, and this alleged “mistake” resulted in TRP being unable to depose Harmony prior to the suspension of this proceeding. Rule 56(f) Mot., pp. 3-7.

In light of the foregoing, DVP’s “Factual Background” misrepresents the true facts of this dispute and should be rejected by the Board. DVP’s arguments regarding the requested genericness and misdescriptiveness discovery should also be rejected by the Board.

B. The DVP Genericness MSJ is Premature and DVP’s Arguments to the Contrary Must be Rejected by the Board

In the DVP Opposition, DVP argues that TRP’s Rule 56(f) Motion should be denied and its Genericness MSJ should be granted solely on the basis that two (2) non-final orders relating to a motion for partial summary judgment were issued in the ongoing District of Nevada case styled TRP Entertainment, LLC v. BC Entertainment, Inc., et al., Case No. 2:08-cv-00579-LDG-RJJ, and because TRP made certain statements in previous litigation styled DRDC Production, Inc. v. TRP Entertainment, LLC, et al., Case No. 2:05-cv-00673-PMP-PAL (“DRDC Action”). DVP Opp., pp. 3-6. DVP is wrong for the reasons identified in its Rule 56(f) Motion, and for the reasons identified below. See Rule 56(f) Mot., pp. 14-17; see infra.

First, the DVP Genericness MSJ is based solely on the Nevada SJ Order, and does not cite to or even mention any of the documents filed in the DRDC Action or any other order. See Genericness MSJ, pp. 1-8. As such, any consideration of those materials or issues in deciding the DVP Genericness MSJ is inappropriate because they were not contained in DVP’s initial brief. See Monsanto Co. v. Bayer Bioscience N.V., 514 F.3d 1229, 1240, n. 16, 85 U.S.P.Q.2d 1582, 1582 (Fed. Cir. 2008)(citation omitted). Additionally, DVP fails to inform the Board that the entire file from the DRDC Action was sealed, and remains sealed. [REDACTED]

[REDACTED] As such, the Board should not consider any materials from the sealed DRDC Action, or DVP’s arguments related thereto.

Even if materials from the DRDC Action are considered, the statements made by TRP in its preliminary briefs in that Action are not binding judicial admissions and are, at the very best, evidentiary admissions that the Board may weigh “within the context of all the evidence.” See DVP Opp., p. 5, n. 3, citing National Spiritual Assembly of Baha’is of U.S. Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of the Bahai’is of the United States of America, Inc., 547 F. Supp.2d 879, 898 (N.D. Ill. 2008)(evidentiary admissions given low probative value)(citations omitted). Indeed, the Board may assign “no weight” to evidentiary admissions. National, 547 F. Supp.2d at 898, citing Murrey v. United States, 73 F.3d 1448, 1455 (7th Cir. 1996). As stated in TRP’s Rule 56(f) Motion, DVP has prevented TRP from obtaining “all the evidence” relating to its genericness arguments, and therefore, the Board should assign no weight to such alleged evidentiary admissions. Rule 56(f) Mot., pp.1-8, 14-19; see supra. However, if the Board chooses to weigh the alleged “evidence” from the DRDC Action at this time, the evidence favors TRP and not DVP since

[REDACTED]

Thus, placed in proper context, the DRDC Action does not prove that “The Rat Pack is Back” Mark is generic.

Similarly, neither the Nevada SJ Order or the Nevada Court’s December 14, 2009 Order on TRP’s Motion for Reconsideration (“Reconsideration Order”) prove that “The Rat Pack is Back” Mark is generic. See DVP Opp., p. 4. Again, genericness is a question of fact, and DVP must produce “persuasive and clear evidence that the contested term has become generic among a majority of the buyer group” in order to satisfy its heavy burden in proving “The Rat Pack is Back” Mark is generic. Rule 56(f) Mot., pp. 14-16, citing In re HOTELS.COM, L.P., 573 F.3d 1300, 1301-1302 (Fed. Cir. 2009); 2 J.T. McCarthy Trademarks and Unfair Competition, §§ 12.12, p. 12-38, 12-42-47 (4th Ed. 2009). DVP has produced no such evidence, and the Nevada SJ Order and the Reconsideration Order are not substitutes for this evidence. Id. TRP should

therefore be allowed to ask DVP and its Rule 26(a) witnesses what facts and evidence aside from these Orders DVP will use to support its genericness claims. See Rule 56(f) Mot., pp. 14-17.

Even if the Board afforded any weight to the Nevada SJ Order or the Reconsideration Order – which it should not – those Orders only address alleged genericness of “The Rat Pack” Mark as opposed to the composite “The Rat Pack is Back” Mark, which DVP now seeks to cancel on the unsupported basis that “adding ‘is back’ to a generic term does not make the phrase unique.” See Rule 56(f) Mot., pp. 15-16. As such, TRP is entitled to discovery from DVP and its Rule 26(a) witnesses about what facts and documents aside from the Nevada SJ Order and the Reconsideration Order that DVP intends to use to support its statements that: (a) “[m]erely adding the qualifier ‘is back’ does not create enough specificity to make the phrase unique”; (b) “[a]ccordingly, the Mark does nothing more than announce that another Rat Pack tribute show is being produced for nostalgic audiences”; (c) “the Board must recognize that adding ‘is back’ to a generic term does nothing special to the generic term so that the relevant public can distinguish TRP’s tribute show from any other collection of Rat Pack impersonators”; and (d) “such analysis is one of first impressions, not one contingent upon fact.” Id.

Finally, despite DVP’s arguments to the contrary, TRP is entitled to discovery regarding DVP’s prosecution of the ‘387 Reg. for “Direct From Vegas the Rat Pack” and why DVP did not disclaim “the Rat Pack” or “Rat Pack” from the underlying application. Rule 56(f) Mot., p. 16. Again, this evidence may be used against DVP as an admission against interest and is relevant to DVP’s claims of genericness of a mark it previously claimed as protectable. Id., citing TBMP 704.04, citing American Rice, Inc. v. H.I.T. Corp., 231 USPQ 793, 798 (TTAB 1986).

For these reasons, and for the reasons stated in TRP’s Rule 56(f) Motion, the DVP Genericness MSJ is premature and DVP’s arguments to the contrary must be rejected.

C. The DVP Misdeshriptiveness MSJ is Premature and DVP’s Arguments to the Contrary Must be Rejected by the Board

DVP begins its misdeshriptiveness Opposition arguments by stating that TRP should not

be entitled to any of its requested misdescriptiveness discovery because DVP “believes that all of the alleged and undiscovered facts are nonexistent.” DVP Opp., p. 6. DVP’s subjective belief regarding the discovery of factual information is irrelevant and should not prohibit TRP from discovering the requested misdescriptiveness materials and testimony identified in TRP’s Rule 56(f) Motion. Rule 56(f) Mot., pp. 9-14, 17-18.³

DVP next argues that discovery regarding DVP’s corporate name and ownership of its “Direct From Vegas The Rat Pack” mark is unnecessary because DVP has submitted some corporate and PTO documents in support of its premature Misdescriptiveness MSJ. DVP Opp., pp. 6-7. However, DVP misses the point, and corporate name and trademark ownership are only part of the discovery TRP seeks to obtain. Rule 56(f) Mot., p. 9. Specifically, as stated in TRP’s Rule 56(f) Motion, TRP is entitled to discovery regarding DVP’s contention that its “Direct From Vegas The Rat Pack” mark is not a geographic indicator because it is derived from DVP’s corporate name, “Direct From Vegas Productions, Inc.” Id.

Next, DVP glosses over TRP’s Rule 56(f) arguments relating to the prima facie misdescriptiveness elements of 15 U.S.C. § 1052(e)(3), and relies almost exclusively on statements made by TRP in its preliminary briefs in the DRDC Action to support its Opposition. DVP Opp., pp. 7-9. As stated above, this sealed material should not be considered, and even if it is, the material is entitled to little or no weight in DVP’s favor. See supra.

With regard to the first 15 U.S.C. § 1052(e)(3) factor, “the primary significance of the mark must be a generally known geographic location,” DVP argues that TRP’s requested discovery is unwarranted because TRP initially argued in the DRDC Action that the singular term “Rat Pack” identified a certain music and era. DVP Opp., pp. 7-8. Even if this evidence is considered, it does not help DVP because the issue here is whether the primary significance of DVP’s “Direct from Vegas The Rat Pack” mark consists of a generally-known geographic

³ As stated in TRP’s Rule 56(f) Motion, whether a mark is primarily geographically deceptively misdescriptive is a question of fact. Rule 56(f) Mot., p. 9, citing In re Save Venice New York, Inc., 259 F.3d 1346, 1351 (Fed. Cir. 2001). This clear Federal Circuit authority contradicts DVP’s repeated statements that misdescriptiveness is a question of law, and not fact. See DVP Opp., pp. 7-9.

location. Rule 56(f) Mot., p. 9. DVP argues that it is not because its mark: (a) “is spatial and temporal”; (b) “is intended to recall to the relevant audience Las Vegas in the 1960’s when the Rat Pack was at their peak popularity”; (c) “invokes the imagination of customers”; and (d) “Respondent intentionally removed the ‘Las’ from the Mark in an attempt to create this distinction.” Id., citing DVP Misdscriptiveness MSJ, p. 9.

[REDACTED]

The bottom line is that TRP is entitled to discovery regarding the above-mentioned DVP factual contentions which will assist TRP in defeating the DVP Misdscriptiveness MSJ. Rule 56(f) Mot., pp. 9-10.

With regard to the second factor of the 15 U.S.C. § 1052(e)(3) test, “the goods must not originate from that location,” DVP argues that since its Las Vegas booking agents and Rule 26(a) witnesses Destinations and Classique⁴, helped procure a few private events in Las Vegas, its services “originate” in Las Vegas, Nevada, as opposed to Westminster, California, TRP is foreclosed from conducting discovery on this issue. DVP Opp., p. 9. Contrary to DVP’s contentions, this misdescriptiveness factor is an issue of fact, and TRP is entitled to discovery about these factual contentions, including at least: (1) how, why, when, and where its show originated; (2) how, when, and where its show was produced and performed; and (3) how, when, and where Destinations and Classique assisted in the “performance” and/or “production” of these shows. See supra.; See Rule 56(f) Mot., pp. 10-11. This discovery will defeat DVP’s allegedly “undisputed” contention that its show “originates” or was “produced” in Las Vegas, Nevada. Id.

Additionally, as stated in its Rule 56(f) Motion, TRP is entitled to discovery regarding DVP’s other “origination” factual assertions. Rule 56(f) Mot., p. 10. This includes discovery

⁴ DVP’s claim that TRP should have known that Destinations and Classique would serve as Rule 26(a) witnesses for DVP simply by virtue of the fact that DVP sent contracts involving those companies on November 6, 2010 is ridiculous. DVP Opp., p. 9, n. 4. Again, DVP did not formerly disclose those parties as Rule 26(a) witnesses until December 9, 2009, the same day DVP filed its Genericness MSJ, and two (2) days before this proceeding was suspended. Rule 56(f) Mot., pp. 9-10.

relating to DVP's contentions that: (1) since the concept for the DVP show "originates" in Las Vegas, Nevada, its services "originate" in Las Vegas, Nevada; and (2) "it is obvious" that its "Direct from Vegas The Rat Pack" mark suggests a Rat Pack tribute show that was venued at the Sands Hotel in Las Vegas in the 1960's. Id. As stated in TRP's Rule 56(f) Motion, obtaining such testimony and documentation is important for TRP in responding to DVP's summary judgment claims and defeating such claims. Id.

With regard to the third factor of the 15 U.S.C. § 1052(e)(3) test, "purchasers must be likely to believe that the goods originate from the geographic location," DVP essentially disregards TRP's Rule 56(f) arguments and instead points to statements made by TRP in the DRDC Action regarding consumer care relating to "The Rat Pack is Back" Mark. See DVP Opp., pp. 8-9. Again, this "evidence" is entitled to little or no weight, especially since [REDACTED]

[REDACTED] See DVP Misdescriptiveness MSJ, Exhibits G-K. Furthermore, despite what DVP argues in its Opposition, DVP has not offered any support for its contention that "[p]urchasers do not believe, nor do they expect or want that the services provided under [DVP's mark] should originate in 2009 Las Vegas, Nevada." Rule 56(f) Mot., p. 11. TRP is therefore entitled to discovery regarding this factual contention. Id.

DVP also ignores TRP's request for discovery relating to DVP's confusing claim that since most of its patrons know something about the Rat Pack and that the Rat Pack performed most of their shows in Las Vegas, "inspiration" should be considered rather than geographic origin for the third element of the 15 U.S.C. § 1052(e)(3) test. Rule 56(f) Mot., p. 11. Again, DVP offers no evidence to support this claim, and TRP is entitled to discovery from DVP and its Rule 26(a) witnesses regarding this factual contention. Id.

DVP does not address TRP's request for discovery under the fourth factor of the 15 U.S.C. § 1052(e)(3) test, "geographic location is a material factor in the decision to purchase."

See DVP Opp., pp. 1-10.⁵ For this reason and the reasons stated in its Rule 56(f) Motion, TRP is entitled to discovery regarding DVP's claims that its mark is not geographically misleading because: "audiences could not be reasonably expected to want to see a Rat Pat (sic) tribute show that was related to California, the location there (sic) the Respondent has its business headquarters. Rather, audiences expect to see a Rat Pack tribute show that uses impersonators to recreate the experience provided to audiences in the 1960's Las Vegas showrooms. Accordingly, the Mark, 'Direct from Vegas' is not geographically misleading; rather it is (sic) symbolizes the experience which the underlying performance delivers." Rule 56(f) Mot., pp. 11-12.

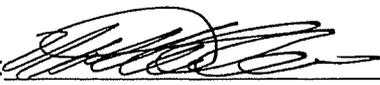
For these reasons, and for the reasons stated in TRP's Rule 56(f) Motion, the DVP Misdescriptiveness MSJ is premature, and DVP's arguments to the contrary must be rejected.

III. CONCLUSION

Before having to respond to the premature DVP SJ Motions, TRP should be afforded an opportunity to obtain the discovery identified above and in its Rule 56(f) Motion. See supra; see Rule 56(f) Mot., pp. 1-19. This discovery is reasonably directed to facts essential to TRP's future summary judgment opposition briefs, and will contradict the statements, alleged "facts," and arguments made in the DVP SJ Motions. Id. For the reasons set forth above, and in TRP's Rule 56(f) Motion, TRP's Rule 56(f) Motion should be granted in the manner requested.⁶

Dated: February 25, 2010

WATSON ROUNDS

By: 

Matthew D. Francis

WATSON ROUNDS

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Attorneys for TRP Entertainment, LLC

⁵ DVP also ignores TRP's request for discovery relating to DVP's false and reckless assertions identified on pages 13 and 14 of TRP's Rule 56(f) Motion. Id. Additional false and reckless assertions relating to TRP's alleged "anti-competitive goals" and "bullying" appear on page 4 of the DVP Opposition. Id. TRP is entitled to the discovery relating to those false claims. Id.; see Rule 56(f) Mot., pp. 13-14.

⁶ DVP's request that its SJ Motions be granted because TRP's Rule 56(f) Motion mentions those SJ Motions is meritless and must be rejected because the Rule 56(f) Motion is not a formal opposition to the premature DVP SJ Motions. See DVP Opp., pp. 1, 10; see Fed. R. Civ. P. 56(f) and 37 C.F.R. § 2.127(e).

CERTIFICATE OF SERVICE

I certify that I am an employee of the Law Offices of Watson Rounds, a Professional Corporation, and on this day I deposited a true and correct copy in the United States mail, first class postage prepaid, in Washoe County, Nevada, of the within document entitled **PETITIONER'S REPLY IN SUPPORT OF FED. R. CIV. P. 56(f) MOTION FOR ORDER DENYING RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT (DOCKET NOS. 13 AND 15) AND ALTERNATIVE MOTION FOR CONTINUANCE TO OPPOSE RESPONDENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT,** addressed as follows:

JACOB L. HAFTER, ESQ.
LAW OFFICE OF JACOB L. HAFTER & ASSOCIATES
7201 W. Lake Mead Boulevard, Suite 210
Las Vegas, Nevada 89128

Dated: February 25, 2010



Robert Hunter

Declaration of Matthew D. Francis

Declaration of Matthew D. Francis

the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: February 25, 2010

WATSON ROUNDS

By: 
Matthew D. Francis
WATSON ROUNDS
5371 Kietzke Lane
Reno, Nevada 89511
Attorneys TRP Entertainment, LLC

Exhibit W

Exhibit W

Matt Francis

From: Matt Francis
Sent: Monday, May 04, 2009 4:21 PM
To: 'Jacob Hafter'
Subject: RE: TRP v. Direct from Vegas
Attachments: ProtectiveOrder.doc

Sorry.

From: Jacob Hafter [mailto:jhafter@hafterlaw.com]
Sent: Monday, May 04, 2009 3:20 PM
To: Matt Francis
Subject: RE: TRP v. Direct from Vegas

There was nothing attached.

From: Matt Francis [mailto:Mfrancis@watsonrounds.com]
Sent: Monday, May 04, 2009 3:38 PM
To: Jacob Hafter
Subject: TRP v. Direct from Vegas

Jacob:

Here is a draft protective order. Please let me know if you have any comments or changes.

Thanks,

Matt



Matthew D. Francis
Attorney at Law

WATSON ROUNDS
5371 Kietzke Lane
Reno, NV 89511

Telephone: (775) 324-4100
Facsimile: (775) 333-8171

mfrancis@watsonrounds.com

competitive, or governmental purpose or function and such information shall not be disclosed to anyone except as provided herein.

3. Any party or non-party wishing to come within the provisions of this Protective Order shall designate, in writing, the documents, information, or portions thereof which he, she or it considers confidential at the time such documents are produced or such information is disclosed, or as soon thereafter as the person or entity seeking protection becomes aware of the nature of the information or materials disclosed and sought to be protected hereunder. In the instance of documents, the items produced must be marked "Confidential" or "Confidential-Attorneys' Eyes Only" by the producing party or non-party. In the instance of depositions, counsel may, in the record of the deposition, designate the transcript or portion thereof as "Confidential" or "Confidential-Attorneys' Eyes Only," and only the parties identified in paragraphs 4 and 5 may then be present in the depositions. The witness under deposition or his counsel may invoke the provisions of this Protective Order in a timely manner, giving adequate warning to counsel for the party or non-party that testimony about to be given is deemed "Confidential" or "Confidential-Attorneys' Eyes Only." The designations should be made on the record whenever possible, but a party may designate portions of a deposition either "Confidential" or "Confidential-Attorney's Eyes Only" provided written notice of such designation is given to each party no later than (10) ten days following receipt of the deposition transcript.

4. Documents, deposition testimony, or answers to interrogatories stamped "Confidential," or copies or extracts therefrom, and compilations and summaries thereof, and the information therein, may be given, shown, made available to, or communicated in any way only to those parties or other persons who agree in advance to abide by this Protective Order and to whom it is necessary that the material be shown for purposes of this litigation.

5. Documents, deposition testimony, or answers to interrogatories stamped "Confidential-Attorneys' Eyes Only" or copies or extracts therefrom, and summaries and

compilations thereof, and the information therein, may be given, shown, made available to, or communicated in any way only to (a) the trial counsel designated on the pleadings for the law firms of record in this actions and those of their staff to whom it is necessary that the materials be shown for the purposes of this litigation; (b) consultants as defined in Paragraph 6 hereof and pursuant to the provisions on Paragraph 7 hereof.

6. For purposes of Paragraph 5(b) hereof, a consultant shall be defined as a person who is not an employee of a party nor anticipated to become an employee in the near future, and who is retained or employed as a bona fide consultant or expert for purposes of this litigation, whether full or part-time, by or at the direction of counsel for a party.

7. The procedure for having a consultant approved for access to information designated "Confidential-Attorneys' Eyes Only" shall be as follows:

(a) The party seeking to have a consultant, as defined in Paragraph 6 hereof, approved shall provide the producing party with:

- (i) the name of the designated person;
- (ii) the present employer and title of said designated person;
- (iii) a resume or curriculum vitae of said designated person;
- (iv) a written acknowledgment, in the form of Attachment A hereto, signed by the designated person for whom approval is sought, that the person has read this Protective Order and agrees to be bound by its terms.

(b) Within four (4) calendar days after mailing (via overnight delivery or email and facsimile) of the information and written acknowledgment described in subparagraph (a), the producing party may object to the person proposed for approval if facts available to the producing party give it genuine reason to believe that there is a reasonable likelihood that the designated person may use information designated "Confidential-Attorneys' Eyes Only" for purposes other than the preparation or trial of this case. Objections must be based upon a legitimate good faith belief in such unauthorized use and shall not be made for purposes of delaying approval of said designated person. Failure to object within four (4) calendar days to a person proposed shall be deemed approval, but shall not preclude a producing party from

objecting to continued access by that person where facts suggesting a basis for objection are subsequently learned by the producing party or its counsel.

(c) If the producing party so objects, the producing and requesting party shall, within four (4) calendar days from the date of the mailing of notice of objection, confer and attempt to resolve the dispute. At the conference, the producing party shall inform the requesting party of its reasons for objecting to the designated person. If the parties cannot resolve the dispute, or if the conference does not take place, then the producing party may move the Board for an order that access to information designated "Confidential-Attorneys' Eyes Only" be denied to the designated person. The time periods are not to restrict either party from moving for a Board order earlier if the circumstances so require.

(d) The parties agree that the information identified above in subparagraph 7(a) shall constitute sufficient information from which to approve said designated person.

8. All confidential information covered by this order shall be kept in secure facilities at trial counsel's offices and in no event be taken to or stored on the premises of a party without having first received written permission from the party designating the document confidential, and access to those facilities shall be permitted only to those designated persons set forth in Paragraphs 4, 5, and 6 of this Protective Order as persons properly having access thereto under the appropriately designated degree of confidentiality. All counsel for the parties who have access to confidential information under this Protective Order acknowledge they are bound by this Order and submit to the jurisdiction of this Board for purposes of enforcing this Order.

9. All pages or parts of Board papers, discovery responses, production documents or things, or deposition transcripts filed with the Board in this action which have been designated as containing "Confidential" or "Confidential-Attorneys' Eyes Only" by either party hereto, or any Board papers purporting to reproduce or paraphrase such Confidential Information, shall be maintained in camera by filing the same in the Clerk's Office in a sealed envelope or other appropriate sealed container on which shall be endorsed the title and docket number of this

action, an indication of the nature of the contents of such sealed envelope or other container, the words "CONFIDENTIAL PURSUANT TO BOARD ORDER," and a statement substantially in the following form:

"This envelope contains Confidential Information filed in this case by [name of party] and is not to be opened nor the contents thereof to be displayed or revealed, except by order of the Board"

10. If any document or information designated to be "Confidential" or "Confidential-Attorneys' Eyes Only" pursuant to this Protective Order is used during the course of a deposition herein, that portion of the deposition record reflecting such confidential information shall be sealed and stamped with the designated degree of confidentiality, and access thereto shall be limited pursuant to the other terms of this Protective Order.

11. A party should designate as "Confidential" or "Confidential-Attorneys' Eyes Only" only such information or documents as the party reasonably and in good faith believes require and justify protection under this Protective Order. If, at any time during the pendency or trial of this action, counsel for any party claims that counsel for any other party is unreasonably claiming certain information produced herein to be confidential, objecting counsel may make an appropriate application to this Board, with confidential portions thereof to be kept under seal, requesting that specifically identified documents, information, and/or deposition testimony be excluded from the provisions of this Protective Order or downgraded in terms of the degree of protection provided. Before filing any such application, the party seeking relief shall confer with the other party to determine whether the matter can be resolved by agreement.

12. The pretrial order submitted by the parties in this action shall address the treatment at trial of documents, information or testimony designated "Confidential" or "Confidential-Attorneys' Eyes Only" pursuant to this Protective Order unless the confidentiality of such information has been removed by agreement of counsel or by this Board in accordance with the provisions of Paragraph 11 of this Protective Order.

13. At any hearing relating to this litigation prior to trial before any judicial officer,

subject to the rules of evidence and order of the Board, a party may use any “Confidential” or “Confidential-Attorneys’ Eyes Only” information or documents for any purpose, provided that adequate prior notice of such use is given to counsel for the opposing party to permit the opposing party the opportunity to obtain appropriate protection from the Board, including a request to the Board that the courtroom be cleared and that the Board employees be advised as to the terms of this Protective Order. If any party reasonably anticipates that “Confidential” or “Confidential-Attorneys’ Eyes Only” information or documents will be presented in any hearing in this litigation, it may request that the Board close the courtroom during such presentation. If the Board denies any such request, the use of the “Confidential” or “Confidential-Attorneys’ Eyes Only” information or documents in Board shall not affect its coverage by this Protective Order or constitute a waiver of secrecy with respect thereto.

14. The terms of this Protective Order shall apply to all manner and means of discovery, including entry onto land or premises and inspection of books, records, documents, and tangible things.

15. This Protective Order shall be effective on the date entered by the Board.

16. Within ninety (90) days after the conclusion of this action, unless otherwise agreed by the parties, all confidential materials and/or information shall be returned to the party or non-party who produced such materials, or to their respective counsel, or such information shall be destroyed, at the election of the producing party.

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IS SO STIPULATED:

Dated: _____

Dated: _____

By: _____

Michael D. Rounds
Matthew D. Francis
WATSON ROUNDS
5371 Kietzke Lane
Reno, NV 89511

By: _____

Jacob L. Hafter
LAW OFFICE OF JACOB L. HAFTER &
ASSOCIATES
7201 W. Lake Mead Boulevard, Suite 210
Las Vegas, NV 89128

Attorneys for Petitioner TRP Entertainment,
LLC.

Attorneys for Direct From Vegas
Productions, Inc.

IT IS SO ORDERED:

Dated: _____

Attachment A

NONDISCLOSURE AGREEMENT

I, _____, do solemnly swear that I am fully familiar with the terms of the Stipulated Protective Order entered in TRP Entertainment, LLC v. Direct from Vegas Productions, Inc., Trademark Trial and Appeal Board, Cancellation No.: 92050557, and hereby agree to comply with and be bound by the terms and conditions of said Order unless and until modified by further Order of this Board. I hereby consent to the jurisdiction of said Board for purposes of enforcing this Order.

Dated: _____

Signed: _____

EXHIBIT X

Redacted - Filed Under Seal